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STATE OF MINNESOTA

OCT 16 2007

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DISTRICT COURT

COUNTY OF RAMSEY

COURT ADMINISTRATOR

By

Deputy

SECOND JUDICIAL DISTRICT
CASE TYPE: Other Civil: Injunction

\$250.00

Scott Sayer and Wendell Anthony Phillippi,

Court File No.: *62-CV-07-3425*

Plaintiffs,

vs.

SUMMONS

Minnesota Department of Transportation,

Defendant.

THE STATE OF MINNESOTA TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned and required to serve upon Plaintiff's attorney an answer to the Complaint which is herewith served upon you within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to timely answer the Complaint, then judgment by default will be taken against you for the relief demanded in the Complaint.

This case may be subject to Alternative Dispute Resolution (ADR) processes under Rule 114 of the General Rules of Practice for the District Courts. The Court Administrator or your attorney can provide you with information about ADR options and a list of neutrals available in your area. ADR does not affect your obligation to respond to the Summons and Complaint within twenty (20) days.

**FABYANSKE, WESTRA, HART &
THOMSON, P.A.**

Dated: October 16, 2007

By:

[Signature]
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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

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CASE TYPE: Other Civil: Injunction

Scott Sayer and Wendell Anthony Phillippi,

Court File No.: _____

Plaintiffs,

COMPLAINT

vs.

Minnesota Department of Transportation,

Defendant.

Scott Sayer and Wendell Anthony ("Tony") Phillippi state the following as their Complaint against the Minnesota Department of Transportation ("MnDOT") regarding MnDOT's award and execution of a contract with Flatiron-Manson a Joint Venture ("Flatiron") for the design and construction of the I35W Replacement Bridge project (the "Project"):

INTRODUCTION

1. We are Scott Sayer and Tony Phillippi and are Minnesota residents and taxpayers.
2. We are bringing this action on behalf of ourselves and as private attorneys general on behalf of all other Minnesota taxpayers.
3. We would have brought this action sooner, but MnDOT kept secret from the public the scoring data about the design-build proposals and the proposals themselves until after MnDOT signed the contract for the Project with Flatiron on Monday October 8, 2007. MnDOT could have awarded the Project to Flatiron much earlier than October 8th, disclosed the scoring data and proposals to the public, and waited to execute the contract. This would have given the

public time to review the proposals for the Project to determine whether they were properly evaluated and truly represented the "best value" for the state's taxpayers.

4. The Department of Administration recommended that MnDOT award the contract earlier than October 8th, release the scoring data and proposals, and wait to sign a contract with Flatiron until after the scoring data and proposals had been released and the public had an opportunity to review them. Instead, MnDOT's Commissioner, the Deputy Commissioner and Senior Administration Officer Robert McFarlin decided to delay award of the contract and to execute the contract at the same time they awarded it in an attempt to discourage judicial review of and protests about MnDOT's award procedures and decisions.

5. Fortunately, MnDOT's contract with Flatiron contains a termination for convenience clause, which essentially allows MnDOT to cancel the contract without cause and without paying Flatiron its lost expected profits for the project. If MnDOT exercised its rights under the termination for convenience clause, MnDOT would only have to pay Flatiron's out of pocket costs incurred to the date that the contract is terminated for convenience. Therefore, it is important that the court rule on the relief requested in this Complaint as soon as possible so that the state's taxpayers do not have to pay for more of Flatiron's out of pocket costs than necessary.

6. Other proposals for the design and construction of the Project are available to MnDOT that would complete the project much more quickly (and less expensively) than Flatiron's proposal, so the Court could declare MnDOT's contract with Flatiron to be illegal and the Project could still be completed earlier than scheduled under Flatiron's contract with no harm to the public.

7. MnDOT's contract with Flatiron is and should be declared illegal. Among other things, Flatiron's proposal was materially non-responsive to MnDOT's Request for Proposals

("RFP"). Flatiron received high scores from MnDOT's Technical Review Committee ("TRC") in areas in which its proposal was non-responsive to the limitations placed on proposals by MnDOT, yet other proposers who abided by the requirements placed on proposals by MnDOT received lower scores in those same areas. Thus, Flatiron's proposal improperly received a competitive advantage that no other proposer received by being non-responsive.

8. For example, portions of Flatiron's design are outside the right-of-way prescribed by MnDOT which allowed Flatiron to avoid many of the problems other proposers had to face by having their proposals remain inside the prescribed right-of-way. The competitive advantage Flatiron obtained by not being responsive to RFP terms that affected price, time, or quality is illegal and renders MnDOT's contract with Flatiron illegal.

9. MnDOT's TRC also improperly scored Flatiron's proposal high in areas in which they knew the proposal was non-responsive, apparently thinking that Flatiron could correct its non-responsive proposal at a later date. It is illegal for MnDOT or its TRC to correct or make assumptions about a non-responsive proposal. In addition, this type of accommodation or favoritism was not given to other proposers.

10. For instance, Flatiron's quality control structure did not comply with MnDOT's stated requirements, yet scoring comments indicate that the TRC assumed that Flatiron would correct this problem later which resulted in Flatiron's receiving scores in this area higher than other proposers whose proposals actually complied with MnDOT's stated requirements. This type of illegal scoring renders the contract that MnDOT entered into with Flatiron illegal.

11. MnDOT's scoring of various proposals was also arbitrary and capricious. The scoring data shows that the TRC noted that certain portions of Flatiron's proposal did not have any strengths and had several weaknesses. The TRC noted the opposite about other proposals –

i.e. that they had several strengths and no weaknesses regarding these very same portions. Yet these portions of Flatiron's proposal, with no noted strengths and several weaknesses, were given a higher score than portions of other proposals with noted strengths and no noted weaknesses. This type of contradictory scoring is patently arbitrary, capricious, and not supported by substantial evidence.

12. MnDOT's scoring of proposals other than Flatiron's also include factual mistakes that cannot be excused by administrative discretion. For example, proposers other than Flatiron were scored low because the TRC did not think certain personnel had desirable experience or authority when, in fact, they did. These scoring errors affected the Technical Scores given to each proposer which affected the determination of the successful proposer. If the technical scoring was materially in error, then so was the determination of the successful proposer.

13. Based on an analysis of the probable market cost of Flatiron's proposal, it appears as if Flatiron has included the cost of any liquidated damages for late completion in its proposal price. Based on a schedule analysis of Flatiron's proposed construction, it is unlikely that Flatiron can complete the Project by the scheduled date. Thus, if liquidated damages are assessed for late completion, the state's taxpayers -- not Flatiron -- will be paying for any late completion of the bridge because the cost of those liquidated damages are already included in Flatiron's proposal. MnDOT has declared the importance of the timely completion of the Bridge by announcing that the taxpayers of the State are being damaged each and every day that the Bridge is out in the amount of \$400,000 per day. An award of the Project to Flatiron cannot, as a matter of law, be the "best value" to the State if the State's taxpayers effectively pay liquidated damages and are left without a remedy for late completion.

14. While the "best value" design-build statute allows an award to other than the lowest cost proposal, the award still cannot by law be extravagant, improvident, or contrary to MnDOT's stated goals. It is illegal, arbitrary and capricious to award a contract to a proposer whose proposal is nearly \$57,000,000 or approximately 33% higher than an alternative acceptable proposal. This is even more true when Flatiron's higher cost proposal also carries with it lost opportunity costs to the public, as calculated by MnDOT, of another \$28,000,000 because Flatiron's proposal takes 70 days longer to build than the least expensive alternative proposal.

15. The facts presented in this Lawsuit have not been reviewed or considered by the protest official designated by MnDOT, so that protest decision is not due any deference.

I. MNDOT WAS REQUIRED EITHER TO REJECT FLATIRON'S RESPONSE TO THE RFP AS NON-RESPONSIVE OR NOT AWARD POINTS TO FLATIRON'S PROPOSAL IN AREAS IN WHICH IT WAS NON-RESPONSIVE

16. Flatiron's Response to the Project's RFP should have been rejected as non-responsive or not have received points in areas in which it was non-responsive. There are numerous glaring examples of Flatiron's non-responsiveness with its response to the RFP. Instead of being rejected or not receiving any points because it was non-responsive, MnDOT's Technical Review Committee ("TRC") preferentially treated Flatiron and ignored or actually rewarded the non-responsiveness of Flatiron's proposal.

A. Lack Of Three Webs For Post-Tensioned Concrete Box Girder Superstructure

17. In RFP Book 2, Section 13.3.3.1.2, MnDOT identified mandatory design criteria for the replacement bridge's superstructure. If a responder elected to propose a post-tensioned concrete box girder superstructure, then MnDOT required a minimum of three webs to secure the superstructure. The RFP states:

"13.3.3.1.2 Type

Superstructure types allowed are as follows:

- Prestressed concrete I-beams
- Spliced post-tensioned concrete girders
- Steel
 - Welded girders (including steel box girders)
 - Rolled beams
- Cast-in-place concrete slab spans
- Post-tensioned concrete slab spans
- Reinforced concrete box girders
- Post-tensioned concrete box girders *

If the Contractor chooses a steel box girder design, a minimum of 3 boxes in each direction of traffic is required. A minimum of 3 webs are required for concrete box designs.* The exterior webs of boxes shall be a constant slope no greater than 5:1 (V:H) slope."

*emphasis added

18. MnDOT's mandatory design requirement for three webs for concrete box girder superstructures was not followed by Flatiron.

19. Appendix A, sheet 1 of the Flatiron Technical Proposal shows typical cross sections for the concrete box girder bridge design proposed by Flatiron. Appendix A, sheet 1 of Flatiron's design shows two typical bridge sections: (1) one is for spans 1-3, and (2) one is for span 4.

20. Flatiron's design detail shows that Span 4 meets the RFP's requirements for three webs (aka "twin-cell" box girder) within the concrete box girder superstructure, but Spans 1-3 do not meet the RFP's requirements as there are only two webs per box girder (aka "single-cell" box girder). See Exhibit A.

21. Because Flatiron's concrete box girder superstructure design is non-responsive to MnDOT's RFP, MnDOT was required either to reject Flatiron's proposal as non-responsive or not award Flatiron any points for that criterion. Instead, the TRC scored Flatiron's proposal

regarding this criterion which favorably affected Flatiron's Technical Score. Flatiron's omission of the third web for Spans 1-3 cannot result in any positive technical points for Flatiron. The omission of the third web results in Flatiron's proposal being non-responsive.

22. Public declarations by MnDOT and Flatiron (and its designer, Figg Engineering) say that the Flatiron design will result in a safer bridge than the bridge that collapsed because of the "redundancies" of Flatiron's design. But Flatiron's proposal does not have the required redundancy mandated by MnDOT. Three of the four spans in Flatiron's proposal contain two, not three, webs for the concrete box girder superstructure, thereby creating four distinct bridges that each contain only 2-web box girder superstructures (aka "single-cell" box girders).

23. The RFP allows a proposer to suggest an Alternative Technical Concept ("ATC") if a proposer wants to modify MnDOT's mandatory design requirements that are stated in the RFP. See Instructions to Proposers ("ITP"), Paragraph 3.7. However, Flatiron did not submit an ATC for its Technical Proposal to modify MnDOT's three web requirement for a concrete box girder superstructure. Consequently, Flatiron failed to use the specified RFP procedure to seek – and obtain – MnDOT's consent to vary from the RFP's design requirements. Flatiron's proposal is non-responsive to MnDOT's RFP.

24. Additionally, by allowing Flatiron, but no one else, to have a two web box girder, MnDOT gave Flatiron a competitive advantage enjoyed by no other proposers. Having a two web concrete box girder superstructure reduced Flatiron's bridge segment size from 90 feet four inches to approximately 42 feet.

25. This substantial reduction in bridge segment size would allow Flatiron to achieve significant cost and time savings (although Flatiron's proposal remained the costliest and had the longest schedule of the four proposals submitted to MnDOT).

26. Reducing the bridge segment size would reduce cost and time for casting, transporting, and erecting smaller segments. MnDOT acted illegally by allowing Flatiron to have a competitive advantage that no other proposer enjoyed.

B. Flatiron's Design Includes Construction That Is Located Outside The Available Right of Way

27. Flatiron's proposal also should have been rejected because its design proposal shows construction that will be located outside of a prescribed right-of-way.

28. However, the RFP instructed proposers to obey the boundaries of existing right-of-way.

29. The RFP stated that additional right-of-way ("R/W") or easements are not allowed. RFP Book 2, Section 7.1 states:

7.1 General

Mn/DOT will acquire all Right of Way (R/W) necessary for the Project. The R/W Work Map (attached as Exhibit A) indicates the existing R/W lines and those parcels being acquired for the Project. The Contractor shall not enter into negotiations for purchase of any property or property rights identified within the Right of Way Work Map (Exhibit A). The R/W Work Map also indicates any permanent and/or Temporary Easements being acquired by Mn/DOT for the Project.

30. MNDOT clarified this issue in one-on-one meetings with at least two proposers other than Flatiron when MnDOT was asked if proposers could explore the option of lowering the 2nd Street profile outside the R/W to eliminate vertical alignment conflicts with the future University Avenue bridge interchange. MNDOT told two other proposers that it was in direct negotiations with the City of Minneapolis, and that it expected to be successful in getting the

City to re-align 2nd St. in the near future. However, for the purposes of this procurement, at least two proposers were told to limit their designs and work to the current right-of-way limits shown on the R/W work map and not to go beyond those limits.

31. On the North end of the Project, the old 35W bridge went over 2nd Street and then 35W continued under University Avenue. If proposers could have sufficiently lowered 2nd Street, then the proposers could improve the vertical profile of 35W so it would not conflict with the future upgrade plans for the University Avenue Bridge. The RFP specifically constrains proposers to work within the right-of-way. Working only within the right-of-way would have required proposers to lower the grade of 2nd Street too steeply and create an undesirable design exception which MnDOT would not allow. In order not to lower the grade of 2nd Street too steeply, two proposers, C.S. McCrossan Construction, Inc. ("CSM") and Ames/Lunda, a Joint Venture ("A/L"), asked if MnDOT would consider a geometric design that would lower the 2nd Street profile beyond the existing right-of-way. MnDOT denied CSM's and A/L's requests. As a result, CSM's and A/L's proposals stayed within the R/W, and they were not able to lower 2nd Street sufficiently to avoid conflicts with the University Avenue Bridge. Consequently, CSM's and A/L's proposals lost or did not receive geometric enhancement points for not providing an optimal vertical profile for 35W to accommodate the future University Avenue Bridge upgrade. Both CSM and A/L were told after contract execution by a TRC member that this issue negatively impacted the scoring of all aspects of their proposals.

32. Appendix A of the Flatiron Technical Proposal contains a sheet entitled "**NORTH END - GEOMETRIC ENHANCEMENTS**". Flatiron's Appendix A, page 38 shows that Flatiron will reconstruct 2nd Street outside of the existing right-of-way that MnDOT required all proposers to use, which allowed Flatiron to lower 2nd Street sufficiently to avoid

conflicts with the future University Avenue Bridge. Flatiron's proposal deliberately went outside the right-of-way to lower 2nd Street. Flatiron did not ask for and did not receive an ATC to design and construct outside the right-of-way. See Exhibit B.

33. There is no RFP mechanism that would allow one proposer to get this advantage as ATCs for Right-Of-Way (RFP Section 7) were NOT ALLOWED by specification (see RFP Section 3.7):

Section 3.7 Alternative Technical Concepts

Mn/DOT realizes that the RFP Scope of Work was developed based on preliminary engineering and that each Proposer may have different approaches for accomplishing the same goals. Mn/DOT has chosen to use the ATC process set forth in this Section 3.7 to allow innovation and flexibility, to allow the design and construction to be completed together thereby minimizing conflicts and maximizing speed and efficiency, and ultimately to obtain the best value for the motoring public.

Mn/DOT will only entertain ATC submittals that propose alternatives to Book 2, Section 8 and Book 2, Section 13.

Proposers may propose up to eight (8) alternatives that are equal or better in quality or effect as determined by Mn/DOT in its sole discretion and that have been used elsewhere under comparable circumstances (ATCs).

34. Consequently, Flatiron's proposal was non-responsive to the RFP's requirements and – for the purposes of proposal evaluation - cannot be cured after-the-fact even if MnDOT subsequently negotiates a larger easement or R/W with the City of Minneapolis or any other land owner.

35. The TRC knew that Flatiron's proposal violated the prescribed right-of-way. One of the prepared questions that was asked of Flatiron was "What are the public and private utility impacts associated with lowering second street?"

36. Even though the TRC knew that Flatiron's proposal was non-responsive, it gave Flatiron the highest ratings. MnDOT acted illegally by giving Flatiron a competitive

advantage that no other proposer enjoyed when it overlooked Flatiron's right-of-way violation. See Exhibit C. Indeed, A/L's proposal was penalized by the TRC because it thought A/L's design contained a retention pond outside the right-of-way. In fact, A/L's retention pond was not outside the right-of-way, but if the TRC penalized proposers for right-of-way infractions, then it is illegal, arbitrary and capricious to reward Flatiron for them.

C. The Project Organization and Quality Plan Proposed by Flatiron Did Not Comply With RFP Requirements.

37. The Experience and Authority of Flatiron's Key Individuals were non-responsive and not properly scored. All Proposers were required by ITP § 4.3.3.3.1 to include an organizational chart in response to this section of their proposal. Flatiron's proposed organizational chart is included as Exhibit D. Book 2, Section 2 "Project Management" of the RFP offered clear guidance regarding personnel requirements as well as the reporting lines to be followed – guidance that Flatiron flagrantly failed to follow on a number of fronts:

- i. Section 2.4.5 of the RFP states that "Quality Control staff shall only have responsibilities in the production of the Work and shall remain independent of the Quality Assurance staff." This requirement is very important to maintain so that Quality Control ("QC") staff is not unduly influenced by Quality Assurance ("QA") staff or *vice versa*. That independence does not exist in Flatiron's proposal because Flatiron's organizational chart shows the QC staff reporting to the Construction QA Manager which is a gross violation of the RFP.
- ii. Section 2.5.2.2 of the RFP states that the Lead Bridge Design Manager "shall report directly to MnDOT's Design Manager." MnDOT's Design Manager is not depicted in Flatiron's organizational chart and so the required line of reporting is not acknowledged by Flatiron.
- iii. Section 2.5.2.2 of the RFP establishes the requirements for Design Manager and Lead Bridge Design Manager. These two positions have different roles and different lines of reporting and consequently should be different individuals. Flatiron identifies the same individual to fill both of these positions. The RFP does not allow the same person to fill multiple roles, except in only one place where the Quality Manager can also be DQAM (Design Quality Assurance Manager) or CQAM (Construction Quality Assurance Manager).

- iv. Section 2.5.2.2 of the RFP states that the Public Information Coordinator “shall report to the Project Manager and MnDOT’s Public Affairs Coordinator”. Flatiron’s proposed organization chart showed the reporting relationship to the Project Manager, but did not acknowledge the reporting relationship to MnDOT’s Public Affairs Coordinator.
- v. Section 2.5.2.2 states that the Visual Quality Manager “shall report to the Design Manager and MnDOT’s Project Manager”. MnDOT’s Project Manager is not depicted in Flatiron’s organizational chart and so the required line of reporting is not acknowledged by Flatiron. Also, it appears that Flatiron has reversed the other half of this reporting requirement and has the Design Manager reporting to the VQ Manager. This contradicts the RFP requirement and minimizes the authority of the Design Manager.

38. Flatiron also improperly failed to recognize and respond to the Quality Control (QC) and Quality Assurance (QA) requirements in the RFP. The QC/QA requirements are found in Book 2, Section 2.4 Quality Management and the associated Appendix A to Book 2, Section 2 – Quality Manual Template.

- i. Book 2, Section 2.4.2 QUALITY MANAGEMENT GOALS requires MnDOT’s involvement throughout the **entire** design development and construction process. The TRC made numerous comments that Flatiron’s proposal did not show the required MnDOT involvement in Quality Control. Other similar comments include, “appreciation of MnDOT’s role is not expressed at all,” and “may be some misunderstanding of MnDOT’s Quality definitions.” Flatiron’s proposal does not address or respond to MnDOT’s required role in the QC/QA process.
- ii. Section 2.4.5.3 QUALITY SYSTEMS – DESIGN contains numerous requirements for design process, including the requirement for Over The Shoulder (OTS) reviews of design packages. Among Kevin Western’s numerous comments about Flatiron’s proposal is that it contains “no discussion ofOTS reviews”. This is a key element in expediting the Design-Build process, yet it is not addressed in Flatiron’s proposal.
- iii. Book 2, Section 2.4.5.7 INTERNAL QUALITY AUDITS requires the Contractor to ensure that quality audits for each element of the quality system are performed at least every six months. Several reviewers note that there is no discussion of self audits in Flatiron’s tech proposal. Flatiron’s proposal does not respond to the RFP requirement for self-audits.

39. Numerous comments by TRC members recognized that Flatiron's proposal regarding QC/QA matters was non-responsive, but Flatiron's proposal nevertheless received positive scores on the QC/QA component of its proposal. Accepting or awarding points for a non-responsive component of a proposal is illegal.

40. Flatiron was improperly and illegally allowed to correct and supplement the omissions in its Technical Proposal by introducing new information at the Oral Interview. RFP Section 5.5 clearly states that, "The Oral interview shall not be used to fill in missing or incomplete information that was required in the written Proposals," and "Topics or issues not addressed in the written Proposal shall not be discussed during the oral presentations."

41. As discussed earlier, the QA/QC component of Flatiron's proposal was non-responsive, but some TRC members' notes reveal that Flatiron was allowed to introduce something called its "Corporate Quality Management Plan" and "the Quality effort started in 1993" at the Oral Interview. This document contains information and elements not described or contained in Flatiron's Technical Proposal. There are numerous elements noted as missing in Flatiron's QA/QC section of its Proposal, yet these missing elements are swept away with TRC notes stating that Flatiron's Corporate Quality Management Plan will cure and address the non-responsive items in Flatiron's proposal. It violates Minnesota law for the TRC or any public body to supply missing material into a non-responsive proposal.

42. Flatiron was also asked questions during the Oral Interview regarding the independence of QC and QA as well as its definition of QC and QA because this information was clearly lacking from Flatiron's proposal. Regardless of how Flatiron answered these questions (which is not clear from the scoring data provided by MnDOT), the answers are not

relevant because they would obviously be providing new information not contained in Flatiron's original proposal.

43. Appendix A of Book 2 contains MnDOT's Quality Templates. A central theme of these templates is that the Contractor's Quality Plan must contain Critical Activity Points or "hold points." These are important milestone points at which work must stop, be inspected, and be documented before work can proceed. MnDOT has always stated that such a plan was essential on past design-build projects. Flatiron's proposal contains no discussion of hold points or Critical Activity Points, which is flagrantly non-responsive. Also, Appendix A contains a placeholder requiring proposers to "Insert Quality Flowcharts from Technical Proposal here". Flatiron did not include any flowcharts in its technical proposal, further confirming that its quality plan was non-responsive.

D. Flatiron's Proposed Safety Approach is Non-Responsive and Arbitrarily Scored.

44. All proposers were required to describe their commitments toward implementing a safety incentive program on the Project. For example, CSM's and A/L's proposals both provided proof of its commitment by demonstrating that safety incentive programs had been used successfully on previous projects and would be used on this one. Flatiron did not provide evidence of any use of safety incentive programs on previous projects. Despite the disparity of response, Flatiron's safety proposal was scored higher than CSM's and A/L's. In fact, Flatiron's experience modification rate, which is an indication of a company's safety record, was worse than CSM's or A/L's, but Flatiron still received a higher safety score.

45. Flatiron proposes to support Cast-in-Place boxes on temporary steel falsework (see Flatiron Technical Proposal, Appendix A – Design Plans, sheet 2 in sequence). On July 31, 2007, one day prior to the collapse of the I35W bridge over the Mississippi River, Flatiron

Constructors Inc., a partner in the Hwy 70 and Hwy 149 project for CalTrans outside of Oroville, California, had a collapse of its temporary steel falsework that seriously injured and nearly killed two people. Given the fact that Safety represents 10% of the value of a proposer's Technical Score, the fact that this incident occurred so recently, and the fact that temporary steel falsework of similar design would be required to complete Flatiron's proposed construction, one would expect MNDOT to have significant concern about this incident in its scoring of Flatiron's proposal. Instead, MnDOT's TRC awarded Flatiron the best safety score of all the teams.

E. Flatiron's Proposal Was Non-Responsive in Regard to its Measures to Evaluate Performance

46. All proposers were required by the Instructions to Proposers Paragraph 4.3.3.3.4 to describe objective measures that will be performed to ensure the constructed product meets or exceeds the contract requirements. The Flatiron proposal does not provide any objective measures that will be performed. In fact, the TRC evaluators did not cite any strengths of Flatiron's proposal with regard to this criterion. Flatiron's proposal was non-responsive in this area, but it still received the highest score of the four proposers.

47. By contrast, the TRC's comments for the CSM proposal noted the following strengths, and no weaknesses:

- "A solid effort"
- Critical Activity Points built into the CPM schedule
- Monthly report on cost of non-conformance w/ std. deviation graph
- Use of NCR's as a learning tool
- 100% of quality incentives returned to workers
- Thorough discussion, specific commitments

The TRC's comments for the Flatiron proposal included no strengths, and the following weaknesses:

- No specific, objective measures proposed
- Evaluation by MnDOT every 2 months is not enough

Even with the noted strengths of the CSM proposal and the obvious weaknesses of the Flatiron proposal, the final score in this area was:

- Flatiron = 7.90
- CSM = 7.78

48. It is illegal, arbitrary, and capricious for Flatiron's non-responsive proposal to be scored, rather than rejected, and to receive more points than other responsive proposals. This type of inconsistency is widespread throughout the scoring process notes and comments provided by MnDOT. For unjustifiable reasons, the non-responsive deficiencies in Flatiron's proposal as identified in written form by the TRC evaluators were accepted when they should have been rejected, positively scored when they should not have received any points, and even rewarded with scores higher than responsive proposals.

II. FLATIRON'S CONTRACT CANNOT CONSTITUTE THE BEST VALUE TO THE STATE BECAUSE THE STATE, NOT FLATIRON, IS PAYING FOR THE PROJECT'S LATE COMPLETION

49. We have also asked others knowledgeable about estimating the cost and schedule of constructing concrete bridges to review the probable market cost of Flatiron's proposal and the likelihood that Flatiron will substantially complete its work by the time estimated in Flatiron's proposal. Based on order of magnitude pricing, Flatiron's market cost for its proposed bridge should cost approximately \$200,000,000 to build. Flatiron's proposal price

was \$234,000,000. The difference between the cost of Flatiron's proposal and the market costs of the proposal is approximately \$34 million dollars.

50. MnDOT has declared timely completion of the bridge to be so important that it is assessing liquidated damages of \$200,000 per day for late completion. At Flatiron's request, however, MnDOT agreed to cap the assessment of liquidated damages at \$200,000 per day for 135 days for a total of \$27,000,000. Thereafter, liquidated damages will only accrue at \$3,500 per day. There is no benefit to the public to cap damages for late completion, and this has not been done on any other MnDOT Design-Build project.

51. It is unlikely in the opinion of several knowledgeable contractors that Flatiron can complete its designed bridge using normal construction means and methods by Christmas of 2008 as proposed by Flatiron. If Flatiron cannot complete its bridge by its stated completion date, there appears to be enough extra money in Flatiron's contract (i.e. \$34 million dollars) to pay for the approximately \$27,000,000 in liquidated damages that MnDOT may impose for late completion. If MnDOT pays Flatiron the money that Flatiron will use to pay liquidated damages, then Flatiron will effectively not pay any liquidated damages from its own pocket for late completion. This means that the tax paying public will be left without any real remedy for late completion - because the public itself will be financing and paying for the damages it is suffering. As a matter of law, it is arbitrary and capricious for MnDOT to execute a contract that allows Flatiron to pay for late completion damages with the public's money because such a contract cannot constitute the "best value" for the public.

III. MNDOT'S DECISION TO AWARD THE CONTRACT TO FLATIRON WAS ARBITRARY AND CAPRICIOUS BECAUSE IT WAS BASED ON CONSIDERATION OF IMPROPER FACTORS AND FAILED TO CONSIDER IMPORTANT ISSUES.

52. The TRC considered an impermissible factor when scoring Public Relations. The only three permissible areas of consideration were the qualifications and experience of the Public Information Coordinator, the proposer's approach to involve stakeholders in the Public Relations process, and the approach to mitigate nighttime construction noise. See ITP Paragraph 4.3.3.6. Three members of the TRC, two of whom are employed by MnDOT, positively commented on Flatiron's plans to use public relations to re-instill public trust in MnDOT. The first prepared question presented to all of the contractors during their oral interviews was "How will your approach on this project aid in re-establishing public trust?" Because the evaluators considered this impermissible factor, their decision was based on factors outside the RFP and was arbitrary and capricious.

53. The decision-making process was further tainted by consideration of a memorial for the victims and survivors of the Bridge collapse. The Flatiron proposal contains at least 22 references to a memorial. Other proposers were given specific direction not to include a memorial in their designs. Favorable scoring of Flatiron's proposal resulting from the inclusion of a memorial is improper, arbitrary and capricious.

54. The TRC failed to consider the life-cycle cost implications of Flatiron's concrete design. Improper TRC partiality towards the Flatiron proposal appears evident with the absence of any concerns being raised with respect to Flatiron ATC #1, which provides an integral 2" wearing surface on the entire bridge. For the cast-in-place box sections of this bridge, concrete pours will have to be made in "segments" that can be completed in a continuous pour, resulting in construction joints between pours. Full-depth pours through the surfacing will lead

to construction joints at each such cast-in-place "segment." Where precast segmental sections are involved for the main river span, the bridge will end up with a transverse joint created at every segment joint across the bridge width over a 505' length. There will be scores of these joints in this span, dependent upon segment length which is not shown in Flatiron's Technical Proposal. These joints will therefore not be protected by a low-permeability wearing course, and will require extensive maintenance and should have raised extreme concerns over ride quality, winter plow damage, chloride infiltration and potential corrosion of the post-tensioning strands, and joint sealant integrity and maintenance. Additionally, a longitudinal closure pour is required for the full length of the bridge to tie the side-by-side concrete box sections together. Since it must also be poured full-depth, two (2) longitudinal cold joints will be created for the bridge length that will also be exposed to the same conditions. Instead, Flatiron's ATC was approved with no mention of any negative impacts and appears to consider that the 2" integral overlay will be removed and replaced by MnDOT at a future date with the future cost absorbed by MnDOT. Failure to consider this impact shows the award decision and the TRC's scoring were arbitrary and capricious.

55. The TRC failed to consider the implications of a concrete box design. MnDOT must expect deck leakage due to eventual micro-cracking and natural porosity of concrete. Longitudinal and transverse cracks that permeate from the surface of the deck through to the inside of the box will increase leakage. To prevent accumulation of moisture or toxic gasses in the enclosed space of the box girders, a ventilation and monitoring system must be part of Flatiron's design. The cost of running, maintaining, and replacing these ventilation fans over the 100-year life cycle of this structure will be considerable. The TRC's failure to address that issue shows its decision-making process was arbitrary and capricious.

IV. MNDOT'S PROPOSAL EVALUATION PROCESS RENDERED TIME AND COST PRACTICALLY IRRELEVANT, LEADING TO THE EXTRAVAGANT AND IMPLAUSIBLE RESULT THAT THE PROPOSAL WITH THE LONGEST DURATION AND A \$57 MILLION HIGHER COST WAS JUDGED THE "BEST VALUE."

56. MnDOT has let five projects including this one using the Design-Build Best Value procurement method. On the previous four projects, the largest gap in technical scoring between the first and second place finisher was 7 points on the TH 212 project let in 2005. Other gaps were 0.5 points, 1.5 points and 3 points. The gap on this Project was 24 points between Flatiron and Walsh-American Bridge. The vast departure from past scoring practice is implausible.

57. The weight of the technical scores is determined by the range or disparity between different proposers because the formula is $(\text{Cost} + \text{Time}) / \text{Score}$, with the lowest value deemed the "best value." MnDOT can control the importance of the technical scores by creating a large scoring gap. The larger the gap, the more importance the technical scores carry and the less importance cost and time carry. Only the unprecedented large disparity in technical scores, caused by the TRC's failure to follow its own scoring system, allowed the selection of a proposal that is \$57 million higher than the lowest proposal.

COUNT ONE – INJUNCTIVE RELIEF

58. We reallege all preceding paragraphs.

59. MnDOT's illegal contract with Flatiron irreparably harms us and all other Minnesota taxpayers. While all commuters want the 35W Bridge rebuilt as soon as possible, we do not want it done with an illegal contract or one that is based on arbitrary and capricious decisions that lead to extravagant and improvident results.

60. Any harm MnDOT would claim that the public would suffer by stopping work on the Project should not be considered because it was caused by MnDOT's own precipitous action in awarding and signing an illegal contract without giving the public time to examine MnDOT's actions. As a matter of law, the harm that the public would suffer in proceeding with an illegal contract outweighs the alleged harm in not proceeding with an illegal contract.

61. We are likely to succeed on the merits. MnDOT's contract is illegal and its proposal process was used in an arbitrary and capricious manner, leading to the illegal, extravagant and improvident result that the longest duration and most expensive proposal was selected as the "best value."

62. Minnesota has a long history of demanding a public procurement process that does not contain any impropriety. MnDOT's actions and contract with Flatiron undermines this long standing public policy and should be enjoined.

63. Stopping work on the contract until the court can fully consider these facts places no administrative burden on the court.

64. We are entitled to temporary, preliminary, and permanent injunctive relief preventing MnDOT from proceeding with performing, or paying amounts under, this illegal contract.

COUNT TWO – DECLARATORY RELIEF

65. We reallege all preceding paragraphs.

66. We are entitled to a declaration that the contract awarded to Flatiron by MnDOT was, among other things, the result of an arbitrary and capricious process, was not supported by substantial evidence, was based on the consideration and scoring of a non-responsive proposal, and is, therefore, illegal and void.

WHEREFORE, we request the following relief:

1. On Count One, a Temporary Restraining Order, Temporary Injunction, and Permanent Injunction against MnDOT stopping all work on the contract and preventing Flatiron from incurring any costs which must be reimbursed by MnDOT.
2. On Count Two, a declaratory judgment declaring the contract awarded to Flatiron to be illegal and void.
3. On Counts One and Two, a judgment in our favor and against MnDOT awarding us costs, disbursements and reasonable attorneys' fees.
4. An award of any other and further relief as the Court deems appropriate.

**FABYANSKE, WESTRA, HART &
THOMSON, P.A.**


Dated: October 16, 2007

By: 

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ACKNOWLEDGMENT

I acknowledge that costs, disbursements and reasonable attorney and witness fees may be awarded under Minn. Stat. § 549.211, to the party against whom the allegations in this pleading are asserted.



Dean B. Thomson